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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 274

DWYER OIL TRANSPORT CO., INC.,
Libellant-Respondent.

against

Tug "EDNA M. MATTON", MATTON STEAMBOAT CO., INC.,
Respondent.

and

Tug "CORPORAL", TUG CORPORAL CORPORATION,
Petitioner.

B. NO. 80 CORPORATION,
Libellant-Respondent.

against

Tug "EDNA M. MATTON", MATTON STEAMBOAT CO., INC.,
Respondent.

and

Tug "CORPORAL", TUG CORPORAL CORPORATION,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 255 F. (2d) 380 and is in the ap-

pendix to the petition at pages 23 to 28. The District Court's findings of fact and conclusions of law are printed at pages 5 through 8 of the Transcript of Record. The judgments of the Court of Appeals and the order denying the petition for rehearing are at pages 29 to 32 of the petition's appendix.

Questions Presented

The petitioner has propounded eight questions involving fact and law issues. Rule 23 (4) requires that the petition present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points submitted for consideration. The instant petition illustrates the necessity for that Rule, as it would be burdensome for this Court to undertake an analysis of the extraneous points here raised. No unusual factor appears to justify a review of this simple night collision between two canal tows.

Statement

In the District Court, where respondent's tug was held solely, it was urged by its counsel that the proofs of petitioner's own tug showed a clear violation of the statute requiring a good lookout (Transcript of Record, p. 9):

> "Nothing in these Rules . . . shall exonerate any vessel . . . from the consequences . . . of any neglect to keep a proper lookout . . ." 31 U. S. C. § 221.

The District Court disregarded the point though cross-examination of the deckhand and navigator of the *Corporal* indubitably established the violation. The Court of Appeals, upon testing that testimony against decisions of this Court and others, concluded that the failure of a good lookout was a statutory fault requiring that petitioner demonstrate that the violation did not contribute to the

collision (*The Pennsylvania*, 86 U. S. 125), and that it had failed to do so.

The finding of the Court of Appeals was compelled to correct an error of the District Court. Petitioner, being satisfied with the apparent result in the lower Court, had made no effort there to show that the violation did not contribute to the casualty. On the appeal hearing, petitioner, though realizing the damaging nature of the testimony, avoided reference to it. Having been disappointed in the modifying decision and finding of the reviewing Court, it now seeks to have this Court try the case *de novo* as if it were a District Court.

At pages 5 to 8 the petition presents a fact argument directed towards showing the fault of the *Matton*, which was conceded on appeal below. Petitioner suggests that this Court should review the conflicting proofs as to times, distances, and observations by the opposing navigators and their deckhands. Respondent does not believe that such matters are the subject of review in this Court, but it cannot let pass the claim that the *Corporal's* engine was reversing for two or three minutes prior to collision, as is asserted at pages 4, 7 and 16 of the petition. The *Corporal's* navigator testified that from the time he first saw the light of the *Matton's* tow until the collision, the *Corporal* flotilla travelled a distance of only 30 to 40 feet (Transcript of Record, p. 21, fol. 62). He testified that all of these things happened as the bow of his barge entered under the bridge: (1) his deckhand called back to him, (2) he then saw the port running light of the *Matton's* barge, (3) *he went astern on his engine*, and (4) he blew a one-whistle passing signal. That testimony was followed by these questions and answers:

> "Q. And within 30 or 40 feet, you had a collision? A. That is right.
>
> Q. That is your testimony? A. That is right."
>
> (Transcript of Record, p. 24, fol. 71.)

If the *Corporal* did not reverse until she was 30 or 40 feet from the *Matton's* tow, how could it be fairly said that her engine was reversing for two or three minutes?

Respondent will make no further reference to the general factual picture for it does not believe that this is the Court for such argument. Under the finding and the law stated by the Court of Appeals there is neither time nor reason for present review of this simple case.

ARGUMENT

I. The conclusions of the Court of Appeals were amply supported with respect to violation of the Lookout Rule and petitioner's failure to show that it did not contribute to the collision.

Preliminary to the review of the decision of the Court of Appeals, it is appropriate to note this Court's recent statement in *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503, 71 S. Ct. 453, 456, 95 L. Ed. 479:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."

These are the conclusions of the Court of Appeals against which the petitioner complains:

> "Although the district judge made no specific finding, the testimony of the *Corporal's* watchman on cross examination clearly indicates that rather than standing in the front of the B. No. 80 and looking up the channel, he was sitting against a tank 40 feet from the bow of the barge and was watching the bank. This impresses us as being a clear violation of the above rule. In that situation the burden was upon the *Corporal* to prove that this

statutory violation could not have contributed to the collision in any way." (Appendix to petition, p. 26.)

* * * * *

"We find nothing in the evidence which would have warranted a finding that, if seasonably informed of *Matton's* approach when the distance between the two barges was significantly greater than the 50 to 100 feet interval which separated them when the *Matton* was actually observed, the *Corporal* could not have averted the collision by reversing sooner." (Appendix to petition, p. 27.)

* * * * *

"Thus if the *Matton* had been seen when the distance between the flotillas was greater—perhaps as much as 220 feet greater—and if in that situation the *Corporal* might properly have continued on for a time in the expectation that it would be allowed to pass the bridge first, as the flotillas approached each other there necessarily would have come a time when it became the duty of the *Corporal* to reverse. For aught that appears, a proper lookout on the *Corporal* could thus have caused her, by reversing sooner, to avert the collision.

We can only conclude that the *Corporal* did not sustain the burden of proof which, under the *Pennsylvania* rule, came into play once her failure to maintain a proper lookout was established." (Appendix to petition, p. 27.)

In brief, this is the testimony of the *Corporal's* deckhand who was charged with the duties of alertly watching for other craft and promptly reporting to the tug's navigator, located some 220 feet astern of the foremost part of his flotilla as it proceeded around a sharp bend and under a bridge where the channel width was but 90 feet:

"Q. When you started to walk up to the bow, where were you standing? A. I was sitting on the No. 2 tank waiting for the relief. It was about five minutes to twelve at the time."

* * * * *

"Q. Which way were you facing as you sat on that tank? A. I was facing on the bank."

• • • • • •

"Q. You were facing toward the port side of your boat as you sat there? A. Yes.

Q. Looking at the bank? A. Yes."

• • • • • •

"Q. And how long had you been sitting there on the tank? A. Maybe five minutes."

• • • • •

"Q. Before you had heard that sound, did you get up at all during that five minutes? A. No. I was sitting there waiting for relief."

• • • • • •

"Q. How far was that boat from you then? A. 50 to 100 feet. It was quite a ways. It was 50 feet or better."

• • • • •

"Q. Before that time, had you looked forward at all? A. Well, no, I don't believe so.

Q. You didn't? A. No." (Transcript of Record, pp. 36, 37.)

With its own proof in that state, petitioner nevertheless seeks to have this Court review what it claims is a conflict of evidence and to reverse the Court of Appeals, though the record tilts sharply against petitioner's arguments by its own damaging testimony. It was never contemplated, throughout the history of this Court, that it should sit *de novo* in admiralty to dispose of simple factual issues already resolved by the District Court and Court of Appeals. The granting of petitioner's application here would serve as an invitation to others similarly postured.

II. The Court of Appeals decision is in harmony with the historic rule of *The Pennsylvania*.

Petitioner seeks to arouse interest here by asserting that there is conflict between the language of the Court of Appeals and that of other Circuits and decisions of this Court. However, the argument is pointless as a reading of *The Pennsylvania* (86 U. S. 125), itself will demonstrate. At page 12, the petition states the law principle of *The Pennsylvania* which has been an admiralty guidepost for many years both in the District and Circuit Courts. Simply stated a presumption arises, in the case of a violation of a statutory rule intended to prevent collisions, that the fault, if not the sole cause, was at least a contributory cause of the accident, and this Court said:

> "In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

In that case there was also language closely paralleling that used by the Courts of Appeals in their decisions:

> "The truth is the case is one in which, while the presumption is that the failure to blow a foghorn was a contributory cause of the collision, and while the burden of showing that it was in no degree occasioned by that failure rests upon the bark, it is impossible to rebut the presumption. . . . Hence, it appears to us the bark has not proved that her failure to obey the shipping regulations was not a concurrent cause of the injury she received; and, consequently, as both vessels were at fault, the damages, according to the admiralty rule, should be divided" (137-138).

The Court of Appeals used precisely the same sort of language in the instant case:

"This impresses us as being a clear violation of the above rule. In that situation the burden was upon the *Corporal* to prove that this statutory violation could not have contributed to the collision in any way." (Appendix to petition, p. 26.)

* * * * *

"We can only conclude that the *Corporal* did not sustain the burden of proof which, under the *Pennsylvania* rule, came into play once her failure to maintain a proper lookout was established." (Appendix to petition, p. 27.)

We assume that if the Court of Appeals had said that the *Corporal* did not sustain the burden of "the evidence" petitioner would have acquiesced in its choice of language, since a great portion of its petition is taken up with the use of the word "proof" by the Court, and by an attempted comparison with this Court's language in *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104, a case which is wholly foreign to this entire discussion.

It is felt that no good purpose would be served in taking up *seriatim* decisions of the Court of Appeals for the Second Circuit and others dealing with the *Pennsylvania* rule. Nor is it deemed necessary to discuss the application of the Major-Minor Fault Rule enunciated in *The Victory-Plymothian*, 168 U. S. 410, for that law proposition was weighed in the Court of Appeals, at the instance of petitioner, as it related to the facts here. The fault of the *Corporal* was not minor and thus it was held equally in fault with the *Matton*.

Further, it was said by this Court in *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282, at page 284, that:

"Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and

> property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases . . . ." (citing law rules and prior decisions of this Court).

That statement is in harmony with this Court's decision in *The Pennsylvania* (*supra*), at page 138, that "as both vessels were at fault, the damages, according to the admiralty rule, should be divided." The *Halcyon* decision strongly indicates this Court's intention to await congressional action on the question. In all events, this is not the case for drastic change of the rule of contribution in maritime causes, for the fault of the petitioner's vessel clearly appeared and it was found by the Court of Appeals that the petitioner had failed to sustain its burden under the rule of *The Pennsylvania*.

CONCLUSION

It is respectfully submitted that the petition for a a writ of certiorari should be denied.

Respectfully submitted,

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September 5th, 1958.